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In the

Supreme Court of the United States

OCTOBER TERM, 1970

HONORABLE BERNARD M. DECKER,
UNITED STATES DISTRICT JUDGE, et al.,
Petitioners,

vs.

HARPER & ROW PUBLISHERS, INC., et al.,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Seventh Circuit

BRIEF OF PETITIONERS

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IN THE

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No. 1337

HONORABLE BERNARD M. DECKER,
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On Writ of Certiorari to the United States
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BRIEF OF PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit (Appendix, pp. 61a-67a) is reported at 423 F.2d 487. The opinion of the District Court for the Northern District of Illinois (Appendix, pp. 7a-21a) is reported at 1969 CCH Trade Cases ¶72,965.

JURISDICTION

The judgment of the Court of Appeals was entered on February 4, 1970, and amended by order of March 11,

1970. The petition for a writ of certiorari was filed on March 20, 1970. It was granted on May 4, 1970. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).[1]

QUESTIONS PRESENTED

1. Whether a writ of mandamus can properly be used, despite the "final judgment" rule and 28 U.S.C. § 1292(b), to reverse a trial court's discovery order for the production of statements made by grand jury witnesses to defendants' counsel describing the witnesses' testimony before the grand jury?

2. Whether the Court of Appeals for the Seventh Circuit erred in holding that an attorney-corporate client privilege extends to narrative statements solicited by corporate counsel from non-management employees about their grand jury testimony?

STATEMENT OF THE CASE

This petition arises out of pre-trial discovery proceedings in multi-district antitrust litigation consolidated before Judge Bernard M. Decker, United States District Court for the Northern District of Illinois. The representative plaintiffs instituted class actions to recover damages on behalf of public schools, public libraries, and parochial schools that were victims of a charged conspiracy by defendant publishers and wholesalers to inflate the prices of library editions of children's books.[2]

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[1] The Court of Appeals stayed the issuance of the writ of mandamus until disposition of these proceedings by orders of February 11, 1970, and March 11, 1970 (Appendix, pp. 67a-71a).

[2] The plaintiffs in the treble-damage proceedings here involved are the States of Illinois, Indiana, Texas, West Virginia, Ohio, Wisconsin, Kansas and Minnesota, the City of Chicago, the Archbishop of Cincinnati, the Metro-

For more than a year and a half, plaintiffs have actively pursued discovery, including taking depositions of approximately one hundred witnesses. Faced with a pattern of forgetfulness, recalcitrance, prevarication and evasiveness by the witnesses, plaintiffs moved under Rule 34 for the production of so-called "debriefing" statements, *i.e.*, narrative accounts taken from employees and ex-employees of defendant companies relating to their testimony before a grand jury investigating price-fixing conspiracies in the sale of children's books to public schools and libraries.

Certain defendants opposed such production, interposing the attorney-client privilege and work-product doctrine.[2] The District Court ordered that all relevant documents be produced, but provided:

> "that if any defendant objects to the production of any document . . . on the grounds of 'attorney-client' or 'work product' privilege, such defendant . . . shall file said document in a sealed envelope, accompanied by a precise factual statement setting forth the circumstances under which the document was prepared." Order of August 7, 1969 (Appendix p. 6)

Upon consideration of the affidavits, briefs, arguments of counsel, as well as a review of deposition testimony and an *in camera* inspection of grand jury testimony, the District Court found that the attorneys "did not ren-

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[2] (Continued)
politan Government of Nashville and Davidson County, and certain school districts in Nassau and Suffolk Counties, New York.

Counsel for several defendants voluntarily turned over "debriefing" statements taken from employees of their corporate clients.

der personal legal advice after the witnesses completed their grand jury testimony," and that "the debriefing consultations were apparently conducted as a favor to the corporations." (Appendix, pp. 15a-16a) Moreover, the district judge made the following findings with respect to deposition testimony of defense witnesses which he reviewed.

> (a) "Each witness demonstrated a remarkable lack of memory concerning critical evidence in controversy" and "what recollection they could muster was often so vague as to be of only limited value." (Appendix, pp. 9a, 13a)
>
> (b) "Some witnesses have been deliberately evasive," "other deponents have forgotten major incidents involving the alleged price fixing and cannot remember receiving incriminating correspondence," and the "deposition testimony sometimes conflicts with documentary evidence which the witnesses personally prepared several years ago." (Appendix, pp. 7a-8a)
>
> (c) The recall of each witness was substantially more extensive when he appeared before the grand jury, and "in each instance, there exist material discrepancies on important factual issues or significant facts that the witness failed to recollect." (Appendix, p. 9a)

In this context, the District Court enumerated several factors justifying release of the debriefing statements to aid plaintiffs to establish critical facts and ascertain the truth:

> "The instant antitrust cases are unusual because the alleged price fixing conspiracy was particularly active six to ten years ago. Although the plaintiffs have voluminous documents available for examination and have deposed a large number of witnesses, the intervening years continue to obscure many crucial factual

> questions. The witnesses have long since forgotten the details of their operations; frequently, they cannot even remember major incidents in which deviations from 'net' prices were punished. Quite regularly, witnesses confronted with copies of their own letters have little or no recall. Similarly, deponents often do not remember receiving incriminating correspondence, nor do they offer reasonable explanations for apparent admissions that their prices were illegally inflated. If the conspiracy existed, plaintiffs' inability to prepare fully for trial results from the publishers and wholesalers' concealment of the price fixing. As public bodies, the plaintiff schools and libraries are charged with a responsibility to protect the taxpayers' finances." (Appendix, p. 20a)

On the record made by defendants, the District Court concluded that three "debriefing" statements were privileged and would be returned to counsel. With respect to thirty "debriefing" statements, however, the District Court determined that (a) the evidence failed to establish that a confidential attorney-client relationship existed, and (b) plaintiffs had shown "good cause" and "special circumstances" for discovery which outweighed the qualified protection afforded work product, even assuming that simple witness narratives could be called work product.

The District Court held that the attorney-corporate client privilege attaches when a responsible member of the corporate management seeks or receives legal advice on behalf of the corporation. In this regard, the District Court found that only two witnesses "were in a position to influence their company's litigation strategy in these lawsuits. While other witnesses, such as sales executives and regional managers, might have shaped the pricing policies concerning library editions, they did not participate in the corporate problem about which legal advice was

sought—the company's litigation response to the price fixing cases. Accordingly, the debriefing documents [with two exceptions] are not protected by a corporate attorney-client privilege." (Appendix, p. 17a)

The defendants sought to have the matter certified for interlocutory appeal under 28 U.S.C. § 1292(b). The District Court, following the holding in *Atlantic City Electric Co.* v. *General Electric Co.*, 337 F.2d 844 (2d Cir. 1964), denied certification on the ground that such a piecemeal appeal would not facilitate the final disposition of the case.[4]

Upon a petition by defendants, the Court of Appeals granted in part and denied in part a writ of mandamus. The Court of Appeals refused to disturb the District Court's findings that no attorney-personal client privilege existed between the corporate counsel and the witnesses interviewed and that "good cause" had been shown for discovery of the work product of defense attorneys. With respect to the issue of attorney-corporate client privilege, the Court of Appeals acknowledged that the District Court had properly applied the law enunciated in previous federal decisions:

> "The district judge substantially followed the 'control group' test of the relationship between corporate client and persons making the communication to the attorney which must exist if the communication is to be protected by the corporation's attorney-client privilege. This test was formulated by Judge Kirkpatrick in *City of Philadelphia* v. *Westinghouse Electric Corp.* (E.D. Pa., 1962), 210 F.Supp. 483. A similar test appears in Rule 5-03(a)(3), Preliminary

[4] Transcript of Proceedings, October 17, 1969, pp. 39-40.

Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, March, 1969.

> Judge Kirkpatrick's control group test has been applied by other courts. *E.g., Natta* v. *Hogan* (10th Cir., 1969), 392 F.2d 686, 692; *Garrison* v. *General Motors Corp.* (S.D. Cal., 1963), 213 F.Supp. 515." (423 F.2d at 491.)

The opinion further conceded:

> "If the control group test be wholly adequate it has not been shown that the district judge erred in his application of it." (423 F.2d at 491)

However, the Court of Appeals concluded that "the control group test is not wholly adequate" and that:

> "because maintenance of the attorney-client privilege up to its proper limits has substantial importance to the administration of justice, and because an appeal after disclosure of the privileged communication is an inadequate remedy, the extraordinary remedy of mandamus is appropriate." (423 F.2d at 492)

Without further effort to justify the use of mandamus, the Seventh Circuit ruled that the District Court's "order is unlawful" and that "a writ of mandamus will issue compelling respondent district judge to exempt from" his discovery order debriefing statements taken from individuals who were corporate employees at the time of the statement, and "to order the return of each of those debriefing statements to the defendants which produced it." (423 F.2d at 491, 492)

The Seventh Circuit did not disturb the District Court's determination that no attorney-corporate client privilege encompassed debriefing statements which corporate counsel gathered from former employees and employees of other companies. By order of March 11, 1970, the

Court of Appeals adhered to this decision, denying a claim of privilege by certain defendants for debriefing statements which they obtained from employees of another company that had acted as their joint sales agent. (423 F.2d at 493)

The issue that remains for resolution by this Court is whether the debriefing statements taken from non-control group employees should be entitled to the protection of an attorney-corporate client privilege.

SUMMARY OF ARGUMENT

I.

The circumstances of this case provide no justification for the issuance of a writ of mandamus by the Court of Appeals for the Seventh Circuit. The District Court not only acted within its jurisdiction and authority, but properly applied the relevant federal decisions, in ordering the production of debriefing statements taken from grand jury witnesses by corporate defense counsel. Disagreement by the Court of Appeals with the well-established legal principles which the District Court followed affords no basis to review, much less disturb, the discovery order entered by the district judge. The use of the extraordinary remedy of mandamus to reverse the ruling by the District Court violates the admonitions of this Court and the federal policy against "piecemeal" appeals embodied in 28 U.S.C. § 1292(b).

The defendants did not cross-petition from that portion of the Seventh Circuit's opinion which denied mandamus with respect to the District Court's discovery rulings.

II.

The debriefing statements ordered produced consisted of narrations by witnesses of what transpired before the grand jury. On the basis of an analysis of the factual circumstances under which these debriefing sessions were conducted, the District Court concluded that the narrative statements did not involve confidential communications from a client for the purpose of securing legal advice from its professional legal advisor. The District Court properly held that such an attorney-corporate client privileged relationship could only exist if the communication were made to an attorney by corporate personnel having authority to control or substantially participate in a corporate decision regarding action to be taken on advice of the attorney.

Only the "control group" of the corporation may be considered the corporate client in the claimed attorney-corporate client privileged relationship. By this means a proper balance is struck between the need to secure access to the facts and the interest allegedly furthered by the privilege. Extension of an attorney-corporate client privilege beyond the control group would conceal the truth and serve no legitimate purpose, as demonstrated by the facts of this case.

ARGUMENT

I. THE SEVENTH CIRCUIT IMPROPERLY USED THE WRIT OF MANDAMUS TO REVERSE THE DISTRICT COURT'S ORDER FOR THE PRODUCTION OF DOCUMENTS.

This Court has consistently held that mandamus will not lie to review a discovery order unless the aggrieved party shows a clear abuse of discretion and establishes an indisputable right to such drastic relief. *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 384 (1953); *United States* v. *Duell*, 172 U.S. 576, 582 (1899).

The reasoning of the Seventh Circuit's opinion itself reveals the lack of justification for issuing a writ of mandamus in this case. The District Court had unquestioned power to direct production of the "debriefing" statements under Rule 34 of the Federal Rules of Civil Procedure. The challenged discovery order rested upon legal principles that had been developed in an uncontradicted line of federal cases.[*] The District Court framed its ruling in reliance, *inter alia*, upon the decision in *City of Philadelphia* v. *Westinghouse Electric Co.*, 210 F.Supp. 483, 485 (E.D. Pa. 1962) (Kirkpatrick, J.), which articulated the control group test with respect to whether statements taken from employees were protected by the attorney-corporate client privilege. The defendants aggrieved by the discovery ruling in *City of Philadelphia* v. *Westinghouse Electric Co.* unsuccessfully petitioned the Third Circuit for a writ of mandamus. *General Electric*

[*] See Comment to Rule 5-03, Preliminary Draft of Proposed Rules of Evidence for United States District Courts and Magistrates, pp. 80-81 (March 1969).

Co. v. *Kirkpatrick*, 312 F.2d 742 (3d Cir. 1962), *cert. denied*, 372 U.S. 943 (1963). The reaffirmance of the control group test by many decisions since Judge Kirkpatrick's 1962 opinion makes mandamus even less appropriate now than when the attorney-corporate client privilege issue confronted the Third Circuit.

Indeed, the Court of Appeals conceded that the district judge properly applied the law embodied in several recent decisions at the trial and appellate level. *E.g.*, *Natta* v. *Hogan*, 392 F.2d 686 (10th Cir. 1968); *Garrison* v. *General Motors Corp.*, 213 F. Supp. 515 (S.D. Calif. 1963).[7] Another panel of the Seventh Circuit had previously indicated acceptance of a standard similar to the control group test by its ruling in *Rucker* v. *Wabash Railroad Co.*, 418 F.2d 146, 154 (7th Cir. 1969):

> "Neither party may successfully assert the attorney-client privilege as to the statements of non-party witnesses. Hickman v. Taylor, 329 U.S. 495, 507. . . . This is true of defendant's statements given by its servants and agents in this case. None were of such rank as to qualify as representative of the corporate client."

The acknowledgment that the District Court "substantially followed" all relevant federal law vitiates any basis to review, much less disturb, its production order by the extraordinary remedy of mandamus.

On numerous occasions this Court has stressed that "only exceptional circumstances amounting to a judicial usurpation of power will justify invocation" of the ex-

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[7] Moreover, precedent in addition to the cases cited by the Seventh Circuit supports the District Court's ruling. *Atlantic City Electric Co.* v. *General Electric Co.*, 61 Civ. 4258 (S.D.N.Y., Dec. 4, 1962) (Ryan, Christensen, JJ.).

traordinary remedy of mandamus to overturn a district court discovery ruling. *Will* v. *United States*, 389 U.S. 90, 95 (1967). The *Will* opinion further states:

> "Courts faced with petitions for the peremptory writ must be careful lest they suffer themselves to be misled by labels such as 'abuse of discretion' and 'want of power' into interlocutory review of non-appealable orders on the mere ground that they may be erroneous. 'Certainly Congress knew that some interlocutory orders might be erroneous when it chose to make them nonreviewable.'" (389 U.S. at 98, n. 6)

This rule and policy against employment of mandamus to review an allegedly erroneous ruling within the jurisdiction of the district court applies with equal force in civil litigation as in criminal cases. *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 382-383 (1953) (a civil antitrust case).

The power to grant the peremptory writ of mandamus must be "reserved for really extraordinary causes." *Ex parte Fahey*, 332 U.S. 258, 260 (1947); *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943). A writ of mandamus is a singularly inappropriate remedy with respect to discovery orders entrusted to the discretion of the trial judge in complex antitrust cases where interlocutory review may be sought for delay or harassment. *Cf. Atlantic City Electric Co.* v. *General Electric Co.*, 337 F.2d 844 (2d Cir. 1964); *Atlantic City Electric Co.* v. *A. B. Chance Co.*, 313 F.2d 431 (2d Cir.), *stay denied*, 83 S.Ct. 964 (1963) (Harlan, J.). Indeed, in the course of these consolidated pretrial proceedings, defendants have twice petitioned for a writ of mandamus to challenge discovery orders. See *Harper & Row Publishers, Inc.* v. *Decker*, 394 U.S. 944 (1969).

For these reasons, this Court has enforced the Congressional prohibition against "piecemeal" appellate review. *E.g., Switzerland Cheese Ass'n.* v. *E. Horne's Market*, 385 U.S. 23, 24 (1966). The opinion in *Cobbledick* v. *United States*, 309 U.S. 323, 325 (1940) stresses the rationale underlying this policy:

> "Thereby is avoided the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment."

The defendants advanced no basis to invoke the extraordinary remedy of mandamus. The District Court applied well-established and sound legal principles to the particular facts of this case in ruling that the evidence failed to establish that the debriefing statements were collected in the course of a confidential attorney-corporate client relationship.

The office of mandamus cannot be used to control the decisions of district courts, but only to confine lower courts to their prescribed jurisdiction. *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 383 (1953); *Ex parte Peru*, 318 U.S. 578, 583 (1943). The bounds of the discretionary power to issue such writs are set forth in *Parr* v. *United States*, 351 U.S. 513, 520-521 (1956) (Harlan, J.):

> "The power to issue them is discretionary and it is sparingly exercised. . . . This is not a case where a court has exceeded or refused to exercise its jurisdiction, see *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21, 26, nor one where appellate review will be defeated if a writ does not issue, cf. *Maryland* v. *Soper*, 270 U.S. 9, 29-30. Here the most that could be claimed is that the district courts have erred in ruling on

matters within their jurisdiction. The extraordinary writs do not reach to such cases; they may not be used to thwart the congressional policy against piecemeal appeals."

The Seventh Circuit's opinion explains the use of mandamus on the grounds that "maintenance of the attorney-client privilege up to its proper limits has substantial importance to the administration of justice" and "an appeal after disclosure of the privileged communication is an inadequate remedy." These assertions offer no valid reason for interlocutory review of the District Court's discovery order by mandamus.

The record contains no evidence to support the assumption that disclosure of these debriefing statements, even if erroneous, would cause any injury that could not be remedied in the normal course of appellate review. The factual affidavits filed by defendants make no claim that production of the debriefing statements would reveal trial strategy, or that any of the debriefing statements contain irrelevant, personal, or otherwise confidential material. As Judge Decker specifically found: "The debriefing statements are essentially factual summaries of the witnesses' testimony" before the grand jury. (Appendix, p. 14a) The defendants will be "injured" by disclosure of such debriefing statements only if their employees have been dishonest or disingenuous during depositions. The extraordinary writ of mandamus was not meant to remedy this kind of injury.

The argument that an alleged error cannot be rectified after disclosure of confidential information applies to all discovery orders. This case is indistinguishable from any other instance in which a lower court orders production of material claimed to be privileged. By using man-

damus to protect against the alleged harm that may result from disclosure of the debriefing statements, the Seventh Circuit's decision invites interlocutory review of all rulings on assertions of an evidentiary privilege. This is not the function that mandamus was intended to serve.

Nor does it matter that a litigant may experience the hardship and inconvenience of a trial before the issue is resolved in the appellate court. The writ of mandamus still may not be used as a substitute for appeal. *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 383 (1953); *United States Alkali Export Ass'n.* v. *United States*, 325 U.S. 196, 202-203 (1945).

The fact that the Court of Appeals thought that the District Court's ruling involved a question of "substantial importance" provides no ground to circumvent the ordinary process of judicial review. The appellate jurisdiction of the federal courts must be exercised under statutory authority conferred by Congress. *Chandler* v. *Judicial Council of the Tenth Circuit*, 38 *U.S. Law Week*, 4413, 4424 (1970) (concurring opinion of Harlan, J.). The discretion to review interlocutory decisions may be exercised only in the circumstances defined by 28 U.S.C. §1292. These conditions were not satisfied in the present proceeding.

II. THE ATTORNEY-CORPORATE CLIENT PRIVILEGE DOES NOT EXTEND TO NARRATIVE STATEMENTS OBTAINED BY CORPORATE COUNSEL FROM NON-MANAGEMENT EMPLOYEES ABOUT THEIR GRAND JURY TESTIMONY

The District Court followed an uncontradicted line of federal authority in holding that an attorney-corporate client privilege did not arise from the debriefing sessions

at which corporate counsel interviewed grand jury witnesses.[8] While the district judge recognized the immunity afforded by the attorney-corporate client privilege, he ruled that:

> "[O]nly communications from certain employees to the company's attorney create that relationship. Specifically, a responsible member of the corporation's management or control group must seek legal advice about corporate affairs. [citation] Moreover, the corporate official must be in a position to influence the decision about which legal counsel is sought." (Appendix, p. 16a)

The Court of Appeals for the Seventh Circuit issued a writ of mandamus to reverse this ruling. It held that the District Court acted unlawfully in finding that the defendants had offered insufficient support for their claims of attorney-corporate client privilege under the applicable legal principles.

An evaluation of the appropriate limits to be placed on the attorney-corporate client privilege and the correctness of the decisions under review requires initial discussion of the type of material which defendants have sought to cloak with the privilege and the circumstances under which these documents were prepared.

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[8] The defendants below claimed the attorney-corporate client privilege for statements taken from witnesses without regard to whether they were employed by the company that counsel represented. In this proceeding, the defendants assert an attorney-corporate client privilege only with respect to employees.

A. THE DISTRICT COURT CORRECTLY HELD THAT THE CIRCUMSTANCES DESCRIBED BY DEFENDANTS DID NOT CREATE AN ATTORNEY-CLIENT PRIVILEGE

The District Court's discovery order rested upon a finding that the necessary factual indicia of an attorney-client relationship were lacking with respect to the narrative statements given to corporate counsel by the grand jury witnesses. On the basis of the "precise factual statement[s]" submitted by defense counsel, as well as deposition testimony, the district judge determined that these simple witness narratives reflected no confidential communications made in the course of an attorney-client relationship.[9]

During the investigation conducted by the federal grand jury into price-fixing in the sale of children's books to public schools and libraries, attorneys for the defendant companies interviewed the various witnesses following their appearance before the grand jury. These interviews were conducted for the avowed purpose of learning from the witness "the substance of his grand jury testimony." [10] "The memoranda record the recollection of [the witnesses] as to what transpired in the course of their re-

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[9] In their affidavits and factual statements, defendants often claimed that the witnesses interviewed were personal as well as corporate clients. The defendants specifically asserted that many of the debriefing statements involved in this proceeding were protected by an attorney-personal client privilege, *i.e.*, the statements taken from witnesses Patella, Guerney, Scioscia, Heidelberger, Stokes, Davidson, Callaway, Hood, Thompson, Moorman, Andresen, and Golden Press "A". These claims of attorney-personal client privilege were rejected and have now been abandoned.

[10] Factual statement with respect to witness Hoocker (Appendix, p. 99a).

spective interrogations before the grand jury."[11] The defense counsel sought to discover what areas of inquiry were being pursued by the federal investigators and what other witnesses had appeared or were scheduled to appear. By having the witness recount the questions asked before the grand jury, the attorneys were able to piece together the evidence which had already been assembled from other sources and presented to the grand jury. In addition, the defendants learned whether other companies had given the grand jury incriminating correspondence which defendants had not retained in their corporate files or which they had construed as not requested by the federal subpoena. Defense counsel attempted to find out not only what each witness informed the grand jury, but also matters connected with the price-fixing conspiracy which the witnesses may not have told the grand jury.

The circumstances of the various debriefing interviews differed slightly. Some witnesses were interrogated by several attorneys, representing their current and past employers. Counsel sometimes jointly conducted these interviews.[12] One attorney interviewed witnesses from four different companies that his firm represented, as well as witnesses from other companies.[13] The recollec-

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[11] Factual statement with respect to witnesses Mitchell and Andrus (Appendix, p. 95a).

[12] Factual statements with respect to Golden Press witnesses "B" (Andresen) and "D" (Roland) (Appendix, pp. 80a-85a).

[13] Factual statements with respect to witnesses Davidson and Patella (Grosset & Dunlap), Guerney and Scioscia (Harper & Row), Stokes (Scribner's), and Heidelberger (E. P. Dutton) (Appendix, pp. 71a-80a). The same attorney also interviewed Mathiesen (E. M. Hale). See Seventh Circuit's order of March 11, 1970 (Appendix, pp. 69a-70a).

tions of witnesses were recorded in several ways—by the witnesses themselves,[14] by dictaphone machines,[15] and by counsel or their secretaries.

The debriefing statements were taken to enable the defendant companies to chart the direction of the federal investigation and to instruct other witnesses who might be called to testify. By the exchange of information gathered from debriefing interviews, defense counsel could advise witnesses of the matters which had come to light and the shoals to avoid.[16] Several years following the conclusion of the grand jury proceedings, some defendants used the debriefing statements to prepare their witnesses for depositions by the treble-damage plaintiffs.[17]

The general criteria for existence of the attorney-client privilege have been phrased in the following form:

> "Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance perma-

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[14] Factual statement with respect to witness Callaway (Appendix, pp. 87a-89a).

[15] Factual statements with respect to witnesses Thompson and Andresen (Appendix, p. 97a), and Golden Press "B" (Appendix, p. 83a).

[16] None of the affidavits or statements submitted by counsel assert that the information contained in the debriefing statements, or the substance of such statements, was kept within the corporation.

[17] Factual statements with respect to witnesses Walker and Dyckman (Appendix, pp. 92a, 94a).

Under generally accepted principles, any material used to refresh the recollection of a witness, even if assertedly privileged, must be made available for use in cross-examination. *National Dairy Products Corp.* v. *United States*, 384 F.2d 457 (8th Cir. 1967), *cert. denied*, 390 U.S. 957 (1968).

nently protected from disclosure by himself or by the legal adviser, except the protection be waived." 8 Wigmore, *Evidence*, §2292 (3d ed. 1940)

Applying the above principles, the District Court determined that the debriefing statements, with two exceptions, were not communications protected by the attorney-client privilege, finding that the grand jury witnesses neither sought nor received legal advice relating to corporate affairs during their debriefing interviews. The record fully supports this determination. The defendants submitted no proof showing that a confidential attorney-client relationship existed when the debriefing interviews were conducted. None of the affidavits stated that the witness interviewed had sought or received legal advice following his grand jury appearance. None of the affidavits stated or even indicated that the witness expected or requested that his disclosure be kept confidential.[18]

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[18] It is likely that defendants purposely confined their affidavits to conclusory assertions. For when counsel ventured to be more specific, they were flatly contradicted by deposition testimony from available witnesses. For instance, counsel for Harper & Row asserted in memorandum form that the debriefing statements were "confidential communications", and that "Messrs. Davidson . . . and Rose sought the advice of that firm and were its clients." But Davidson testified that he was interviewed about his grand jury testimony at the request of counsel for his corporate employer and that it made no difference to him whether his statement was kept confidential. (Davidson Deposition Tr. 13, 17) The testimony of Rose further refutes these false assertions:

> "Q. After you testified before the Grand Jury, did you tell anyone about what you told the Grand Jury?
>
> A. Yes. . . . I simply called Bill Ashworth [sales manager of Harper & Row] to tell him I had been out there, and he asked me if I would have any objection to speaking with *their lawyer*. I said 'No.'" (Rose Deposition Tr. 27)

The debriefing statements simply recorded interviews by corporate counsel with assorted salesmen and sales managers in order to summarize the recollections of these witnesses as to their grand jury testimony.[12] The testimony of Leslie Rowe exemplifies the nature of the debriefing interviews, and the fact that the witnesses were not involved in the litigation for which the narrative statements were collected. Rowe related that he was questioned about his grand jury testimony on separate occasions by counsel for G. P. Putnam's Sons (his former employer), and Thomas Y. Crowell Co. (his current employer). He attended these interviews at the request of the corporate attorneys, not to secure legal advice or discuss the position his company should take in the litigation. Rowe did not request or understand that his narrative would be kept confidential. (Rowe Deposition, Tr. 23-31)

Based on the factual record made by the defense counsel and witnesses, the District Court rejected all but two claims of attorney-corporate client privilege, holding that a attorney-corporate client privilege only attaches when a responsible or appropriate member of the corporate management seeks or receives legal advice on behalf of the corporation. This has been described as the "control group test."

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[12] In these endeavors, the attorneys acted as little more than scriveners. *Cf. Bifferato* v. *States Marine Corp.*, 11 F.R.D. 44, 46-47 (S.D.N.Y. 1951) (Weinfeld, J.)

B. THE CONTROL GROUP TEST PROPERLY DEFINES THE SCOPE OF THE ATTORNEY-CORPORATE CLIENT PRIVILEGE

The federal courts have given limited application to the attorney-corporate client privilege,[20] heeding the admonition quoted in *Radiant Burners, Inc.* v. *American Gas Ass'n*, 320 F.2d 314, 323 (7th Cir. 1963):

> "Nevertheless, the [attorney-corporate client] privilege remains an exception to the general duty to disclose. Its benefits are all indirect and speculative; its obstruction is plain and concrete. . . . It is worth preserving for the sake of a general policy, but it is nonetheless an obstacle to the investigation of the truth. It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle."

It is clear that the granting of a privilege to conceal relevant information from scrutiny of a judicial proceeding carries a heavy burden of justification. The person or group asserting the privilege must establish the right of concealment. As stated by Professor Wigmore, four fundamental conditions are recognized as necessary to the establishment of a privilege against the disclosure of communications:[21]

> "(1) The communications must originate in a *confidence* that they will not be disclosed.
>
> "(2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
>
> "(3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered;* and

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[20] This Court has never determined that an attorney-corporate client privilege actually exists.

"(4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation."

8 Wigmore, *Evidence* § 2285 (3d ed., 1940)

The debriefing statements taken by corporate counsel from non-management employees do not satisfy these prerequisites.

The control group test which the District Court applied has been developed by the federal decisions to delineate what communications qualify for the attorney-client privilege in the corporate context or, in other words, who should be considered as the "client." Since privilege is invoked solely on behalf of the corporate client, its protection has been held to extend only to confidential communications between the corporate attorney and corporate personnel having "the authority to control, or substantially participate in, a decision regarding action to be taken on the advice of a lawyer, or [an individual who] is an authorized member of a group that has such power." *Natta* v. *Hogan*, 392 F.2d 686, 692 (10th Cir. 1968).

The decision in *City of Philadelphia* v. *Westinghouse Electric Corp.*, 210 F. Supp. 483, 485 (E.D. Pa. 1962, Kirkpatrick, J.), sets forth the rationale for the control group test:

"Keeping in mind that the question is, Is it the corporation which is seeking the lawyer's advice when the asserted privileged communication is made?, the most satisfactory solution, I think, is that if the employee making the communication, of whatever rank he may be, is in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney, or if he is an authorized member of a body

> or group which has that authority, then, in effect, he is (or personifies) the corporation when he makes his disclosure to the lawyer and the privilege would apply. In all other cases the employee would be merely giving information to the lawyer to enable the latter to advise those in the corporation having the authority to act or refrain from acting on the advice."[21]

This doctrine derives from the decision in *Hickman* v. *Taylor*, 329 U.S. 495, 508 (1947), that "the protective cloak of [the attorney-client] privilege does not extend to information which an attorney secures from a witness while acting for his client in anticipation of litigation."[22]

The control group test has been followed by a number of other federal courts. *E.g., Honeywell, Inc.* v. *Piper Aircraft Corp.*, 1970 CCH Trade Cases ¶ 73,122 (M.D. Pa. 1970); *Garrison* v. *General Motors Corp.*, 213 F. Supp. 515 (S.D. Cal. 1963); *Atlantic City Electric Co.* v. *General Electric Co.*, 61 Civ. 4258 (S.D.N.Y., December 4, 1962) (attorney-corporate client privilege held not to protect "a stenographically reported statement which had been given

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[21] Subsequent to his enunciation of the control group test, Judge Kirkpatrick ruled that production of a debriefing statement was "not forbidden by the attorney-client privilege." *City of Philadelphia* v. *Westinghouse Electric Corp.*, 32 F.R.D. 350, 351 (E.D. Pa. 1962). Judge Kirkpatrick had already rejected a claim of privilege by defendant "with respect to the information acquired by its general counsel, Mr. Wood, in the course of his investigation of facts relevant to the impending indictment of the company." *City of Philadelphia* v. *Westinghouse Electric Corp.*, (Memorandum Opinion dated July 19, 1962).

[22] The attorney in *Hickman* v. *Taylor* represented the owner of the tugboat involved in a fatal crash, and the witnesses interviewed were crew members who had survived.

by the witness to counsel for his employer, C. H. Wheeler Company, in the presence of the president of the company, concerning the testimony theretofore given by the witness to the Grand Jury").[23]

The District Court applied the control group test in determining what persons were encompassed within the definition of "client" for purposes of the privilege. The debriefing statements taken from James Milne, a sales manager, and George Bonsall, an executive vice-president, were held protected by the privilege and returned to the corporate defendants. These were the only two instances in which the defendants claimed that the employee interviewed had any connection with the formulation of corporate policy in response to the government investigation and potential lawsuits.

The control group test strikes an appropriate balance between the interests sought to be protected by the attorney-corporate client privilege and the legitimate need of litigants to secure access to the facts. The circumstances under which the debriefing statements were collected precludes any assertion that the attorney-corporate client privilege is necessary to encourage full disclosure of

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[23] Acknowledging this "trend" of cases, the Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates embodies the control group test, setting forth the general rule of privilege as follows:

> "A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communicatons (1) between himself or his representatives and his lawyer or his lawyer's representatives." (Rule 5-03(b))

It defines a "representative of the client" as:

> "One having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client." (Rule 5-03(a)(3))

facts by the witness to the corporate attorney. The interviews were not conducted in a confidential atmosphere. The employees simply recounted their experiences before the grand jury at the request of the corporate attorneys, just as they would report to any corporate officer. The statements were not elicited by an expectation of a confidential relationship between the employees and the attorneys representing their companies. In fact, defendants admitted that debriefing statements taken from certain witnesses were circulated or made available to officers of their respective companies.[24] Moreover, the defendants have asserted that the attorney-corporate client privilege should not be waived and confidentiality not broken even by circulation of the debriefing statements among other companies who might become co-defendants or named co-conspirators in subsequent litigation.

The holding that no privilege attaches to reports from non-management personnel to corporate attorneys would have no adverse effect upon the ability of corporations to secure necessary information from these employees. The only conceivable barrier to the witness being candid might arise from a fear of discipline if the employee had violated the law unbeknownst to the corporation or incriminated the corporation (and others) by his admissions to the grand jury. *Cf. United States* v. *Procter & Gamble Co.*, 356 U.S. 677, 681-82 (1958); *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 400 (1959). But the attorney-corporate client privilege offers no protection against such contingencies, since the privilege belongs to the corporation, not the individual.[25]

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[24] Factual statements with respect to witnesses Callaway (Appendix, p. 89a) and Walker (Appendix, p. 92a).

[25] *E.g.*, factual statement of Golden Press (Appendix, pp. 85a-86a).

Nor may it be seriously contended that interviews with employees would not be held if later disclosure of statements to damage plaintiffs were a possibility. Every time a corporation amasses information about itself—sales figures, cost studies, travel records, executive diaries—it creates discoverable material that may be valuable in price-fixing cases or other litigation against the company.[20] But corporations do not cease keeping records, or collecting facts, simply because they may have evidentiary significance in lawsuits.

In this regard, it must be noted that the records of interviews conducted by corporate attorneys in preparation for litigation are protected to the extent that such documents embody the work product of the attorneys. *Hickman* v. *Taylor*, 329 U.S. 495 (1947). Discovery of work product may not be secured except upon a showing of "particularized need" or special circumstances. This provides adequate, but flexible, protection for the memoranda of attorneys.

In this case, the corporate attorneys interviewed certain witnesses to ascertain the nature of the grand jury investigation so that they could advise their companies, construct their defense, and prepare exculpatory testimony and documents. But the need to gather information from employees for the purpose of giving legal advice to the corporate client does not itself establish an attorney-corporate client relationship between the attorney and the employee interviewed, no more than it would create such a relationship between the attorney and any other

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[20] A corporation has no privilege against self-incrimination. *Hale* v. *Henkel*, 201 U.S. 43, 73 (1906); *Wilson* v. *United States*, 221 U.S. 361 (1911).

witness who may possess facts essential to the preparation of a case.

The Court of Appeals made the existence of a privilege turn upon whether the employee narrated his recollections to the corporate attorney "at the direction of his superiors in the corporation." 423 F.2d at 491. But in this case, the grand jury witnesses were not agents of the company for the purpose of seeking legal advice. The fact that the corporation may have directed these non-management employees to report certain facts to a corporate attorney does not vest those employees with the necessary authority to create a confidential attorney-client relationship. See *Garrison* v. *General Motors Corp.*, 213 F. Supp. 515, 518 (S.D. Cal. 1963).

The Seventh Circuit's opinion suggests different rules for reports from employees who are bystander witnesses and communications from employees relating to the performance of his employment duties. But this distinction between "witnesses" and "participants" directly conflicts with the holding in *Hickman* v. *Taylor*, 329 U.S. 495, 508 (1947). Moreover, it creates a wholly unworkable means to determine the proper limits of the attorney-client privilege. The distinction between the employee as participant and witness is particularly inappropriate in anti-trust conspiracy cases, where a mere wink or nod may be sufficient evidence of intent to join in a collusive scheme.[27]

The affidavits and descriptions filed with the District Court by defense counsel reveal that the debriefing inter-

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[27] See, *e.g.*, *Esco Corp.* v. *United States*, 340 F.2d 1000, 1007 (9th Cir. 1965). If the corporate sales manager, for instance, tells the company's lawyer that he told the grand jury (or avoided telling the grand jury) that he attended a meeting where competitors agreed on prices, the sales manager must properly be characterized as a witness.

views were mainly intended to learn what transpired before the grand jury. In this situation, the employee was merely a witness to the questions and answers that occurred in the grand jury room. The giving of testimony to the grand jury constituted no part of the employee's duties to the corporation. Accordingly, the debriefing statements would not be entitled to protection even under the Seventh Circuit's view.

In addition, a number of grand jury witnesses were employed by several different companies during the price-fixing conspiracy. The attorney-client privilege certainly should not protect what these witnesses told the lawyer for their current employer about testimony concerning their sales practices at other companies.

The debriefing statements involved in this case concern the recollection of witnesses with respect to testimony concerning instances of reprisals by publishers against price-cutting wholesalers, reports about violations of the net-price system, exchange of information among co-conspirators, and the maintenance of the price-fixing scheme by other companies involved (as well as their own employers). The Seventh Circuit's opinion provides no rationale for affording protection to such materials.

C. EXTENSION OF THE ATTORNEY-CORPORATE CLIENT PRIVILEGE WOULD IRREVOCABLY CONCEAL THE TRUTH AND SERVE NO LEGITIMATE INTEREST

The attorney-corporate client privilege constitutes an imposing barrier to the ascertainment of facts through discovery procedures. Securing facts through corporate witnesses is a difficult task in itself, especially where

much time elapses between the event and the examination of witnesses at depositions or trial. Established programs within the corporation for the periodic destruction of papers eliminate one source of evidence. Without the possibility of being impeached by written correspondence, memoranda or other documents, witnesses can safely retreat behind a lack of recollection.

These problems are heightened in antitrust damage actions. Due to the inevitable time lapse between a price-fixing conspiracy and the damage trial, access to earlier recorded recollection, such as the debriefing statements in this case, is crucial to effective discovery. Because of the self-concealing nature of the conspiratorial acts, the victims generally do not learn of them until the federal government, equipped with superior means of investigation, has brought charges. For both legal and practical reasons, private damage actions usually do not progress to the discovery stage until the government action is completed or settled. Thus, the discovery aspect of private damage litigation may not occur until three to five years after the conspiracy has been unmasked, and even more years after the crucial events and conversations that were the inception of the illegal scheme. If, as frequently occurs, the federal action is settled by a *nolo contendere* plea or consent judgment, damage plaintiffs must themselves prove the violation.[28] In that effort, the great obstacle is the failing memories of conspirators—real or feigned.

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[28] This case is such a situation. Moreover, the states, cities, and public agencies involved in these damage actions were denied intervention in the federal proceedings which led to the entry of a consent decree. *See City of New York v. United States*, 390 U.S. 715 (1968).

It has been frequently stressed by this Court "that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws," *Minnesota Mining & Mfg. Co.* v. *New Jersey Wood Finishing Co.*, 381 U.S. 311, 318 (1965); *Emich Motors Corp.* v. *General Motors Corp.*, 340 U.S. 558, 568 (1951). Without materials to refresh recollections or reveal that stories have altered over time, recovery for damages as a result of illegal price-fixing may be frustrated by well-rehearsed, false and evasive testimony.

The District Court's findings of particularized need for release of the debriefing statements in this case express strong policy reasons against extension of the attorney-corporate client privilege. Speaking of the deposition testimony given by defense witnesses, the District Court concluded that "each witness demonstrated a remarkable lack of memory concerning crucial evidence in controversy," that "what recollection they could muster was often so vague as to be of only limited value," and that "some witnesses have been deliberately evasive" and recalcitrant. Comparing the deposition testimony with grand jury testimony given more than three years earlier, the District Court found that the recall of each witness was substantially more extensive when he appeared before the grand jury, and "in each instance, there exist material discrepancies on important factual issues or significant facts that the witness failed to recollect."[29]

[29] The District Court made similar findings of fact with respect to the discrepancies between deposition and grand jury testimony of additional witnesses by order and memorandum opinion entered on January 16, 1970: "Particularly prevalent in the deposition testimony is the evasiveness of these witnesses when asked questions central to the issues in this litigation, *e.g.*, the alleged price

Since the debriefing interviews were conducted more than three years prior to the depositions in these treble-damage actions, and concern aspects of the illegal price-fixing conspiracy charged in the complaints, the debriefing statements are invaluable to plaintiffs as clues to whether a deponent has been mistaken, evasive or dishonest. The District Court concluded that the debriefing statements should be released to plaintiffs for the purpose of refreshing the recollections of witnesses and impeaching deposition testimony.

Moreover, the debriefing statements disclose relevant aspects of the price-fixing conspiracy not fully probed by the grand jury and lead to other relevant evidence. As the District Court noted, "a witness may have specified that there were no questions concerning various enumerated incidents of dubious legality." (Appendix, p. 15a, n. 12) One example in this respect is a debriefing statement taken from Si Goldman, an ex-employee of defendant Macmillan Company, which reads:

> "Mr. Goldman related that the Grand Jury had been especially interested in sales manager meetings held monthly in New York beginning roughly in 1961 and continuing until early 1965. The Grand Jury seemed to suspect that these meetings were the occasion for price fixing among publishers and concerted action against discounters. Mr. Goldman was able to testify only as to his inability to recall any discussion on his part of net prices at these meetings, although he conceded to us that others had discussed

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[28] (Continued)

fixing and conspiratorial activities. This evasiveness is all the more notable when contrasted with the witnesses' demonstrated ability to recall events and facts equally remote in time, but with only a peripheral relationship to the allegations of the complaint." (p. 5)

net prices in general although not comparatively between publishers." [30]

A reference in another debriefing statement taken from Goldman throws additional light upon the discussions which occurred among publishers at the "sales managers meetings" with respect to enforcement of the net-price system:

> "Goldman was asked from whom he received information concerning Sapsis' [a book wholesaler] price cutting. Goldman testified that he heard about this from Carl Leibel [another book wholesaler]. . . .
>
> "Goldman said to Leibel that he would look into the matter when he saw Sapsis. He told us that he did this to please the customer. (Goldman really wanted to warn Sapsis about comments he had heard by people other than Macmillan people at a sales manager luncheon. These non-Macmillan people said that they would cut Sapsis off.)" [31]

In addition, other debriefing statements obtained by plaintiffs show that witnesses concealed valuable information in both grand jury and deposition testimony. For example, the debriefing statements taken from Clarence N. Roland, who was sales representative or manager at different times for three defendants—Childrens Press, Golden Press and Follett—sharply contradict his deposition testimony and reveal that the witness had deliberately

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[30] Debriefing statement taken from Si Goldman by attorneys for Macmillan, July 7, 1966 (Goldman Deposition Exhibit 9).

[31] Debriefing statement taken from Si Goldman by attorneys for Macmillan, November 30, 1966 (Goldman Deposition Exhibit 10).

withheld information from the grand jury itself.[32] The following statement recorded by an attorney for Childrens Press is illustrative:

> "Roland told the debriefers but not the grand jury that occasionally he did purposely 'lose' orders from discounting jobbers." (p. 5)

The expression "purposely 'lose' orders from discounting jobbers" described a means used by publisher defendants to coerce jobbers into maintaining the fixed net prices as charged in the complaints.

The tape recorded debriefing statement taken at the same interview by Golden Press exposes Roland's evasive testimony before the grand jury concerning enforcement of the net-price system upon wholesalers. This may be seen from Roland's description of the questions posed and his responses:

> "Do you know of any instances where you have done so [lost orders of discounting wholesalers]? And I paused and in my pause he took another question up so I didn't answer it because I was about to answer Yes."
>
> * * *
>
> "Do you know of any instances where Wally Black actually threatened to cut off anyone? About the time I was about to answer, the Court steno stopped for something and this broke his line of questioning."[33]

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[32] Pursuant to Judge Decker's order of October 17, 1969, Childrens Press turned over its Roland debriefing statement to plaintiffs. This debriefing statement was marked as Roland Deposition Exhibit 2.

[33] Debriefing statement taken from C. R. "Larry" Roland by Golden Press, August 31, 1966, pp. 3, 4 (Roland Deposition Exhibit 1).

Prior to Roland's grand jury appearance, three or four defense counsel reviewed with him the evidence that had already been uncovered by the grand jury (and apparently secured by defendants from debriefing sessions with other witnesses), and Roland's own knowledge about the establishment of the prices fixed by publishers for sales of children's books to schools and libraries. The comments of counsel and the witness which were tape recorded during the debriefing session subsequent to Roland's grand jury appearance indicate the attitude of the witness and the nature of his grand jury testimony in this sensitive area:

> "Now, yesterday you told us [the lawyers] about some specific instances . . . . What did you tell him [the examiner] about, in specifics that you can remember? As I told you yesterday I intended to stay away from any specifics unless he crowded, and he didn't crowd."
>
> "I said as far as I know, Runyan [a discounting wholesaler] fell in line. 'Fell in line,' you said? No. I didn't, I'm using it for you. Well I think the phrase I used to him was Bob 'went along with it' because it was to his advantage to do so as he was getting a piece of the business.
>
> Each time you talked about conversations with jobbers and to the best of your knowledge did you insist that it was to the advantage of the wholesaler to do it? Yes."[24]

It has never been demonstrated, however often asserted, that the benefits to be derived from hobbling the judicial process by the doctrine of privileged attorney-corporate client communications exist, no less that they are superior to the benefits of full disclosure that is the

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[24] Debriefing statement taken from C. R. "Larry" Roland by Golden Press, August 31, 1966, pp. 6-7, 14 (Roland Deposition Exhibit 1).

principle upon which the entire judicial process depends. No answer has ever been documented to Professor Morgan's challenge:

> "Whether the client be a plaintiff or a defendant or a mere witness, he is subject to compulsory process and may be required to disclose at the trial or hearing every pertinent fact within his knowledge, under the sanction of an oath or its equivalent that obliges him to tell the whole truth. If he told his lawyer the truth, he must now tell the same thing from the witness box. If he told his lawyer a lie and sticks to it, he will tell the same story at the trial or hearing. If he told his lawyer the truth and now tells a lie, why should he be protected from exposure? Is the privilege retained in order to protect perjurers? How can that either directly or indirectly further the administration of justice?[35]

The defendants have invoked the attorney-corporate client privilege in this case to suppress factual admissions contained in the debriefing statements. There can be no justification in permitting the defendants to keep this material secret and foreclose plaintiffs from this access to the truth. The debriefing statements are not the product of a confidential or other type of relationship which society should foster. Moreover, the debriefing interviews constitute a serious invasion of the grand jury secrecy and proceedings.

In essence, the witnesses were questioned about what occurred before the grand jury so that corporate defense counsel could parry and deflect the federal investigation. The work product doctrine adequately protects whatever interest may be asserted on behalf of this practice.

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[35] Morgan, Foreword to *Model Code of Evidence*, 26-27. (A.L.I. 1942)

In the proceedings below, the defendants sought to conceal the absence of any factual basis for their claims of attorney-corporate client privilege behind extended and hypothetical policy discussions. The short answer is that the control group test does not interfere with the ability of corporate attorneys to give legal advice to the corporation and its proper representatives in confidence. The corporation, through its management or effective control group, may consult counsel without fear of future disclosure. The attorney may exchange information and opinions with those officials who need such material to make corporate decisions. These communications and discussions, of course, retain their traditional privilege. Only factual material or reports collected by the corporate attorneys from employees outside the effective control group are subject to disclosure. In this respect, defendants cannot seriously contend that the public interest would be served by allowing the truth to be suppressed after a violation of law has occurred.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed and the writ of mandamus vacated.

Respectfully submitted,

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